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Prava Palacharla
IIT Chicago-Kent College of Law

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THE RIGHT TO SPEAK WITH ANOTHER'S VOICE—WHY THE SEVENTH CIRCUIT SHOULD CHARACTERIZE THE RIGHT TO RECORD AS THE LIMITED RIGHT TO GATHER INFORMATION UNDER THE FIRST AMENDMENT

PRAVA PALACHARLA

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INTRODUCTION

Recognizing the ease with which oral communication can be recorded and distributed in an increasingly technological society, the Illinois General Assembly enacted the Illinois Eavesdropping Law (IEL) to protect an individual's right not to be recorded without her permission.¹ The IEL, most recently amended in 1994, prohibits recording oral communication between conversing parties without both parties' consent.² Notably, the IEL criminalizes recording without consent, regardless of whether the conversing parties intended the communication to be private.³

Tension between eavesdropping statutes and the First Amendment brought similar statutes under review in numerous

¹ See Illinois Eavesdropping Law, 720 ILCS § 5/14-1(d) (1994).

² *Id.*

³ *Id.*

circuits throughout the country.⁴ In 2012, the Seventh Circuit addressed this issue in *American Civil Liberties Union v. Alvarez*.⁵ In *Alvarez*, the American Civil Liberties Union (“ACLU”) sought declaratory and injunctive relief from enforcement of the IEL over its police accountability program, in which ACLU members would publish audiovisual recordings of police officers performing their duties.⁶ Overturning the district court’s dismissal of the ACLU’s amended complaint, Judge Sykes, writing for the majority, granted the ACLU injunctive relief and analyzed in detail the constitutionality of the IEL under the First Amendment.⁷ In doing so, the majority held that the ACLU would likely succeed on the merits of its claim that the IEL violates rights protected by the First Amendment.⁸ Judge Posner dissented, arguing that the IEL survives the intermediate scrutiny test under the First Amendment because it protects the legitimate government interest of privacy.⁹

This Comment proposes that while the Seventh Circuit correctly found that the IEL is likely unconstitutional under the First Amendment, the court incorrectly characterized the right to record as the expansive right of expression guaranteed by the plain text of the First Amendment. Instead, the Seventh Circuit should have found that the right to record falls within the more narrow right to gather information under the First Amendment, which the Supreme Court of the United States first dictated in *Branzburg v. Hayes*.¹⁰ Part I of this Comment provides an overview of the IEL and the Seventh Circuit’s decision in *Alvarez*. Part II of this Comment analyzes how the Supreme Court of the United States and other federal circuits have characterized the right to record as a right to gather information under the First Amendment. Finally, Part III of this Comment argues that the

⁴ Glik v. Cuniff, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁵ Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir.2012), cert. denied, 133 S. Ct. 651 (2012).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 610 (Posner, J., dissenting).

¹⁰ *Id.* at 586 (majority opinion); *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972).

Seventh Circuit should adopt this narrower interpretation of the First Amendment and characterize the right to record as the limited right to gather information under the First Amendment.

I. BACKGROUND

A. *The evolution of the Illinois Eavesdropping Law*

In 1961, the Illinois General Assembly enacted the original IEL, which prohibited the use of “an eavesdropping device to hear or record all or part of any oral conversation without the consent of any party thereto.”¹¹ An eavesdropping device is defined as any device that may be used to hear or record an oral conversation for the purpose of eavesdropping.¹² The committee comment notes of the 1961 statute indicate a clear intent to protect the privacy of conversation between individuals.¹³ However, the statute was amended in 1976, emphasizing the legislature’s concern for consent over privacy.¹⁴

The 1976 amendment required the consent of *all* parties to the conversation before the conversation could be recorded legally.¹⁵ However, in 1986, the Illinois Supreme Court in *People v. Beardsley* narrowly interpreted the 1976 amendment to prohibit recording only those conversations that were intended to be private, regardless of consent.¹⁶ In *Beardsley*, the defendant was convicted under the IEL for recording two police officers from the back of their squad car.¹⁷ The Illinois Supreme Court reversed the defendant’s conviction under the IEL, despite the fact that the defendant did not have permission to record either police officer, as required by the 1976 amendment.¹⁸ Instead, the court interpreted the IEL statute to apply only to those

¹¹ Illinois Eavesdropping Law, 720 ILCS § 5/14-1(a) (1994).

¹² *Id.*

¹³ Celia G. Gamrath, *A Lawyer's Guide to Eavesdropping in Illinois*, 87 Ill. B.J. 362, 363 (1999).

¹⁴ § 5/14-2(a)(1).

¹⁵ *Id.*; Gamrath, *supra* note 13, at 363-64.

¹⁶ *People v. Beardsley*, 115 Ill.2d 47, 49 (1986).

¹⁷ *Id.* at 50.

¹⁸ *Id.*

situations where the conversing parties had an expectation of privacy.¹⁹ Because the police officers conversed in front of the defendant, the court held they had no expectation of privacy from his recording.²⁰ Accordingly, the court reversed the defendant's conviction, finding that there was no violation of the IEL.²¹

Eight years later, the Illinois Supreme Court reaffirmed its interpretation that recording a conversation was only punishable under the IEL if the conversing parties had an expectation of privacy.²² In *People v. Herrington*, a defendant was found not to have violated the IEL where she secretly recorded a conversation she had with a suspect without his consent.²³ Like in *Beardsley*, the court in *Herrington* found that the suspect had no expectation of privacy from the person he was conversing with, whether or not that person previously obtained his consent.²⁴

In response to the Illinois Supreme Court's reluctance to give weight to the consent requirement of the 1976 amendment, the Illinois legislature amended the IEL once again in 1994.²⁵ This time the legislature unequivocally contradicted the Illinois Supreme Court's precedent by prohibiting the recording of conversations "regardless of whether one or more of the parties intended their communication to be of a private nature," thus overriding the *Beardsley* and *Herrington* decisions.²⁶ In doing so, the Illinois legislature gave teeth to the 1976 consent amendment, and explicitly eliminated a privacy requirement under the IEL.²⁷

¹⁹ *Id.* at 56.

²⁰ *Id.* at 64.

²¹ *Id.* at 65.

²² *People v. Herrington*, 163 Ill.2d 507, 510 (1994).

²³ *Id.* at 511-12.

²⁴ *Beardsley*, 115 Ill.2d at 50; *Herrington*, 163 Ill.2d at 510.

²⁵ Illinois Eavesdropping Law, 720 ILCS § 5/14-1(d) (1994); *Beardsley*, 115 Ill.2d at 65; *Herrington*, 163 Ill.2d at 511.

²⁶ § 5/14-1(d); *Beardsley*, 115 Ill.2d at 65; *Herrington*, 163 Ill.2d at 511.

²⁷ 720 ILCS §§ 5/14-1(d)-2(a)(1); Gamrath, *supra* note 13, at 363-64.

B. American Civil Liberties Union v. Anita Alvarez

In 2012, the American Civil Liberties Union challenged the constitutionality of the Illinois legislature's amendment to the IEL through a preliminary injunction. In *Alvarez*, the Seventh Circuit, in evaluating the likelihood of the plaintiff's success on the merits, conducted a detailed analysis of the constitutionality of the IEL, noting that in First Amendment cases, "the likelihood of success on the merits will often be the determinative factor."²⁸ The court also noted that appellate review of an injunction is appropriate where the case "raises only a legal question," like in *Alvarez*.²⁹

The district court found the ACLU lacked standing for two reasons, but the first was cured before appeal.³⁰ The second reason was the basis for the district court's dismissal of the ACLU's complaint.³¹ The district court dismissed the plaintiff's complaint because it found that the First Amendment does not protect a right to audio record, and thus the ACLU could not allege a constitutional injury.³² However, on appeal, the majority held that the right to audio record is expression protected by the First Amendment, so the court allowed the case to proceed.³³

²⁸ *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004).

²⁹ *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012)(citing *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 151 (7th Cir. 2006)) (holding that plaintiff's injunction was properly decided on appeal because it raised a pure legal question under the First Amendment).

³⁰ After the ACLU amended its complaint, the District Court found the ACLU had standing based on a credible threat of prosecution. *Alvarez*, 679 F.3d at 591.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 590.

1. The Majority's Analysis

The majority began its analysis by discounting the district court's reading of *Potts v. City of Lafayette*.³⁴ The district court had based its dismissal of the ACLU's complaint on the Seventh Circuit's language in *Potts*, which stated "there is nothing in the Constitution which guarantees the right to record a public event."³⁵ However, the Seventh Circuit found the district court's reading of *Potts* to be too narrow, and pointed to other language within the opinion which stated that the right to record, or the right to gather information, may be limited under proper time, place or manner restrictions applicable to content-neutral regulations.³⁶ The court cited this language as evidence that, even in *Potts*, the court considered the right to record to be protected, at least in part, by the First Amendment.³⁷

The district court also dismissed the ACLU's complaint because it found there could be no reciprocal right to receive speech without a willing speaker.³⁸ However, the Seventh Circuit reasoned that *Alvarez* does not implicate the "willing speaker doctrine" because the speech has already taken place, been heard, or been "received."³⁹ The court noted that anyone standing within earshot of an officer can hear what he says, so the speech has been received, and it requires no "presupposed willing speaker."⁴⁰ Therefore, the remaining question is only whether the government can restrict the way in which speech is received.⁴¹ Accordingly, the Seventh Circuit centered its analysis in *Alvarez* on this issue.⁴² The court analyzed the right to audio record as

³⁴ *Alvarez*, 679 F.3d at 591 (citing *Potts v. City of Lafayette*, 121 F.3d 1106, 1111 (7th Cir. 1997)).

³⁵ *Id.*

³⁶ *Potts*, 121 F.3d at 1111 (holding that an officer may refuse entry to an onlooker at a Ku Klux Klan rally for bringing a video camera onsite because the camera could be used as a weapon or projectile in a volatile situation).

³⁷ *Alvarez*, 679 F.3d at 590-91.

³⁸ *Id.* at 592.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 595.

⁴² *Id.* at 595.

two protected First Amendment rights: a) the right of free expression; and b) the right to gather information.⁴³ First, the court argued that audio recording is an integral step in the speech process, such as note taking, and should be equated with free expression.⁴⁴ Next, the court explored the narrower right to gather information under the First Amendment.⁴⁵

a. The Seventh Circuit's characterization of the right to record as free expression.

The majority stated that audiovisual recordings are media of expression commonly used for the preservation and dissemination of information and ideas and thus are “included within the free speech” guarantee of the First and Fourteenth Amendments.⁴⁶ The court reasoned that by prohibiting audiovisual recording, the IEL “forecloses an entire medium of expression,” preventing individuals from disseminating audio recordings, and in turn, limiting free expression.⁴⁷

The court cited various examples to illustrate this notion, including an individual's ability to take notes, write, or paint a public event without the consent of those participating.⁴⁸ The majority found these actions to be part of a process of expression, which if regulated, would ultimately regulate free expression.⁴⁹ The Seventh Circuit referred to the Supreme Court's campaign-finance cases to further illustrate this point.⁵⁰ In *Buckley v. Valeo*, the Supreme Court held that restricting how money can be spent on political communication necessarily reduces the quantity and quality of expression.⁵¹ Similarly, the Seventh Circuit argued that restricting the medium of audiovisual

⁴³ *Id.* at 598.

⁴⁴ *Id.* at 595-98.

⁴⁵ *Id.* at 598.

⁴⁶ *Id.* at 595.

⁴⁷ *Id.* at 596.

⁴⁸ *Id.* at 595-96.

⁴⁹ *Id.*

⁵⁰ *Id.* at 596-97.

⁵¹ *Id.* at 596 (citing *Buckley v. Valeo*, 424 U.S. 1, 4 (1976)).

recording would also limit the breadth and depth of topics, which would otherwise be discussed after the distribution of these recordings.⁵² More specifically, the court reasoned that the ACLU's intent to record police officers would spark discussion, criticism, and speech about government conduct, speech that lies at the core of the First Amendment.⁵³ The court held that because the IEL restricts a medium of expression, it restricts an integral step in the speech process.⁵⁴

b. The Seventh Circuit's characterization of the right to record as the narrower right to gather information.

The majority then transitioned from its argument that audiovisual recording is a step in the overall process of expression to exploring the narrower right to gather information under the First Amendment.⁵⁵ The court cited the Supreme Court opinion *Branzburg v. Hayes*, where a journalist was compelled to reveal his confidential source to a grand jury despite the burden this revelation had on his newsgathering function.⁵⁶ Despite the outcome of *Branzburg*, the Supreme Court acknowledged within the opinion that newsgathering qualifies for First Amendment protection, noting, "Without some protection for seeking out the news, freedom of the press could be eviscerated."⁵⁷ However, the Court in the same opinion cautioned against an expansive right to gather information.⁵⁸ Ultimately, the Seventh Circuit relied on *Branzburg* to establish that some, at least limited, right to gather information exists under the First Amendment.⁵⁹

⁵² *Alvarez*, 679 F.3d at 596-97.

⁵³ *Id.* at 597.

⁵⁴ *Id.* at 599.

⁵⁵ *Id.* at 597.

⁵⁶ *Id.* at 598; *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

⁵⁷ *Alvarez*, 679 F.3d at 598; *Branzburg*, 408 U.S. at 681.

⁵⁸ *Alvarez*, 679 F.3d at 598-99.

⁵⁹ *Id.* at 597-98.

c. The Seventh Circuit applies its analysis to find that the statute is likely unconstitutional under the First Amendment.

The court then analyzed which standard of scrutiny should be applied to the IEL.⁶⁰ Because content-specific regulations are presumptively invalid, they are subject to strict scrutiny.⁶¹ Contrarily, content-neutral regulations are subject to intermediate scrutiny, requiring that a statute's means reasonably achieve a significant governmental interest.⁶² Thus, a content-neutral regulatory measure may be permissible as a reasonable "time, place, or manner restriction."⁶³

In *Alvarez*, the court found it "unlikely that strict scrutiny will apply" because the IEL restricts all audio recordings regardless of what is recorded and thus is content-neutral on its face.⁶⁴ In holding so, the court rejected the ACLU's argument that because a court would have to hear the recording to determine if it violated the IEL, it must be content specific.⁶⁵ On the contrary, the court acknowledged that it is often necessary for a judicial body to hear or see speech to determine if it violates a law, but that need alone does not make the law a content-specific regulation.⁶⁶ Accordingly, the court applied the intermediate standard of scrutiny and found that the statute is likely unconstitutional under even this lower standard.⁶⁷

Although the court acknowledged that the government has a significant interest in privacy, it held that the 1994 amendment to the IEL does not reasonably achieve this interest.⁶⁸ Because the 1994 amendment criminalizes recording conversation without the consent of all the parties, regardless of the fact that the speech was said publicly,

⁶⁰ *Id.* at 603.

⁶¹ *Id.*

⁶² *Id.* at 604-605.

⁶³ *Id.* at 605.

⁶⁴ *Id.* at 604.

⁶⁵ *Id.* at 603-604.

⁶⁶ *Id.*

⁶⁷ *Id.* at 607.

⁶⁸ *Id.* at 605.

out-loud, and without any secrecy, the court reasoned that it is overly broad, and thus overly restricting of a protected First Amendment right.⁶⁹ Under the 1994 amendment, if a person did not obtain the consent of a public speaker, she could be prosecuted under the IEL for recording conversation that was *intended* to be public. As such, the court went to great lengths to distinguish a statute that criminalizes the recording of private conversation from a statute that criminalizes the recording of any conversation.⁷⁰ Accordingly, the Seventh Circuit found that the IEL is likely unconstitutional under the First Amendment, and granted the ACLU's preliminary injunction.⁷¹

2. Judge Posner's Dissent

Judge Posner, in his dissent, cited three main reasons for dissenting from the majority's analysis: 1) people retain an expectation of privacy even in public forums; 2) there is a significant government interest in ensuring the safety of officers, informants, and witnesses; and 3) the majority's interpretation will have a chilling effect on speech.⁷² For these reasons, Judge Posner would have affirmed the decision of the District Court and held for the defendant in this case.⁷³

First, Judge Posner went to great lengths to establish that people retain some expectation of privacy even in public settings. He cited various examples to illustrate this point, including a situation where a police officer may be speaking with a victim in a low voice on a crowded sidewalk.⁷⁴ He argued that even though there are people within earshot, as the IEL requires, the conversing parties might still have a reasonable expectation of privacy.⁷⁵ Civilians speaking to police officers might also retain an expectation of privacy when they

⁶⁹ *Id.* at 607.

⁷⁰ *Id.* at 605-06.

⁷¹ *Id.* at 608.

⁷² *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (Posner, J., dissenting).

⁷³ *Id.* at 610.

⁷⁴ *Id.*

⁷⁵ *Id.*

are conversing with an officer. This holds particularly true when the civilian is a victim, witness, or informant trying to communicate urgently, but privately, with the police.⁷⁶ Judge Posner asserted that public spaces still include speakers with reasonable privacy expectations.⁷⁷ Moreover, he argued that the IEL seeks to protect exactly this privacy by requiring consent of the conversing parties.⁷⁸ Thus, he suggested that there is a governmental interest in protecting private conversation that occurs in public places. As such, under his analysis, a consent requirement is a regulation within the means of the legislature to proscribe.⁷⁹

Second, Judge Posner cautioned the majority on the dangerous effect the *Alvarez* decision may have on future police activity.⁸⁰ He painted a picture where both civilians and officers are put at risk when private information is released to the public.⁸¹ He also stated that distracting officers from their duties by requiring them to anticipate a recording in a society where almost every individual regularly carries a recording device in their phone is detrimental to the safety of the officer and the people he seeks to protect.⁸²

Third, and finally, Judge Posner used both of these compelling governmental interests to illustrate that the majority's attempt to protect First Amendment rights will have the exact opposite effect, and will instead chill free expression.⁸³ Judge Posner discussed the significant impact that a recording has on the credibility of an individual, much more of an impact than note taking or recitation.⁸⁴ He emphasized that this is particularly true in a society where things are uploaded to the Internet and distributed within seconds.⁸⁵ Judge Posner argued that allowing individuals to take audio recordings of

⁷⁶ *Id.* at 611-612.

⁷⁷ *Id.* at 613-614.

⁷⁸ *Id.* at 610.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 611.

⁸² *Id.* at 612-13.

⁸³ *Id.* at 609.

⁸⁴ *Id.* at 614.

⁸⁵ *Id.* at 612.

people without their consent will make people overly cautious about what they can say, thus deterring free expression.⁸⁶ Consequently, Judge Posner dissented from the majority, and found that the ACLU would not likely succeed on the merits.

II. SUPREME COURT AND FEDERAL CIRCUITS INTERPRET THE RIGHT TO RECORD AS THE RIGHT TO GATHER INFORMATION

Though the Supreme Court has never ruled on the right to take an audiovisual recording of a police officer, it has more broadly acknowledged a First Amendment right to gather information.⁸⁷ Various circuits, in interpreting the right to audio record officers, have ruled in conjunction with the Supreme Court's analysis in *Branzburg*, and found that the right to record stems from a limited First Amendment right to gather information.⁸⁸

A. *Supreme Court*

As discussed in Section B of this Comment, the Supreme Court of the United States first recognized the right to gather information in *Branzburg v. Hayes*. In that case, the Court reasoned that in order for the press, or people, to have the right to speak, they must first have some smaller right to seek out information. Consequently, the Supreme Court interpreted the First Amendment to protect at least some right to gather information.⁸⁹

However, the Court has also cautioned against finding that the right to speak and publish carries with it the unrestrained right to gather information.⁹⁰ Instead, the Court acknowledged that the right to gather information, if interpreted too broadly, would have detrimental effects on government functions, such as judicial, administrative, and

⁸⁶ *Id.* at 613-14.

⁸⁷ *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972).

⁸⁸ *Glik v. Cuniffie*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁸⁹ *Branzburg*, 408 U.S. 665 at 708.

⁹⁰ *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Press Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 15 (1986).

even military operations.⁹¹ The right to gather information, when characterized as a narrow First Amendment right, can be weighed properly against other governmental interests, such as privacy. However, as the Seventh Circuit noted in *Alvarez*, the Supreme Court has not clarified the scope of the right to gather information since *Branzburg*.⁹²

B. Other Circuits

Since *Branzburg*, other federal circuits have relied upon the Supreme Court's delineation of the First Amendment right to gather information when evaluating the validity of eavesdropping statutes.

The First Circuit in *Glik v. Cuniff* held that police officers were not entitled to qualified immunity for arresting the plaintiff for recording the officers performing their public duties.⁹³ Under a qualified immunity analysis, a plaintiff must demonstrate that an officer violated a clearly established constitutional right. In *Glik*, the court held that the officers violated the plaintiff's clearly established right to record matters of public concern. Notably, the court reasoned that the right to record matters of public concern derives from the limited right to *gather information* under the First Amendment, rather than the expansive right of free expression.⁹⁴

Similarly, the Eleventh Circuit in *Smith v. City of Cumming* held that the right to photograph and videotape police conduct is protected by the First Amendment right to *gather information* about what public officials do on public property.⁹⁵ The court further held that the right to gather information is a limited First Amendment right that is subject to reasonable time, place and manner restrictions.⁹⁶

Though the Third Circuit Court of Appeals has not heard this issue, its district courts have also reasoned in *Robinson v. Fetterman*

⁹¹ *Branzburg*, 408 U.S. 665 at 706.

⁹² *Alvarez*, 679 F.3d at 599-600.

⁹³ *Glik*, 212 F.3d at 1333.

⁹⁴ *Id.*

⁹⁵ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁹⁶ *Id.* at 1332-1333.

and *Pomykacz v. Borough of West Wildwood* that the right to film police officers in the performance of their public duties is derived from the right to *gather information* under the First Amendment.⁹⁷

The Supreme Court of the United States has recognized a limited First Amendment right to gather information.⁹⁸ When presented with eavesdropping statutes, several circuits, including the First, Third, and Eleventh Circuits, have all interpreted the right to audio record as a right to gather information under the First Amendment, subject to reasonable time, place and manner restrictions.⁹⁹ Similarly, the Seventh Circuit should also find that the right is derived from a limited right to gather information under the First Amendment, rather than equating audiovisual recording to free expression.

III. SEVENTH CIRCUIT SHOULD INTERPRET THE RIGHT TO AUDIO RECORD AS A LIMITED FIRST AMENDMENT RIGHT TO GATHER INFORMATION

A. *The Seventh Circuit's Flawed Legal Reasoning*

The Supreme Court of the United States has not yet decided whether the right to audio record officers is free speech.¹⁰⁰ Instead, the Court has set out a limited right to gather information under the First Amendment.¹⁰¹ The circuits have interpreted the right to audio record government officials as a right to gather information under the First Amendment. The Seventh Circuit should follow the precedent outlined by the Supreme Court and other federal circuits and find that the First Amendment right raised by the IEL is the right to gather information, rather than free expression itself.

⁹⁷ Robinson v. Fetterman, 378 F.Supp.2d 534, 541 (E.D.Pa. 2005); Pomykacz v. Borough of West Wildwood, 438 F.Supp.2d 504, 513 (D.N.J. 2006).

⁹⁸ *Branzburg*, 408 U.S. 665 at 706.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

As the First Circuit noted in *Glik*, the right to audio record police officers is central to an individual's ability to collect information about the government and its activities.¹⁰² As the majority noted in *Alvarez*, the reason the IEL violates the First Amendment is because it prevents individuals from exercising their ability to collect and disseminate information about the police.¹⁰³ Moreover the ACLU, in its challenge to the constitutionality of the statute, centered its arguments on the notion that citizens have a right to ensure that police officers are held accountable for their actions in performing their public duties.¹⁰⁴ However, as the Supreme Court indicated in *Branzburg*, though collecting information about the government is central to the protections of the First Amendment, it is not equal to the right of free expression. Here, the IEL prohibits the act of recording, *not* the act of speaking. In fact, the IEL puts no restriction on an individual repeating a conversation she hears, or publishing the contents of that information.¹⁰⁵ Thus, the Seventh Circuit incorrectly equates the right to record someone else's speech as the right to express one's own speech.¹⁰⁶

This analysis returns us to the district court's reasoning that free expression cannot exist without a willing speaker.¹⁰⁷ While the Seventh Circuit was correct in its assertion that the "unwilling speaker doctrine" is not implicated where the speech has already been received, the court incorrectly dismissed the district court's argument without acknowledging that there is something inherently different about reusing the speech of a person who does not wish her voice to be shared.¹⁰⁸ This forced dissemination of expression implicates rights that are much more similar to the right of an individual to forcibly gather information about governmental activities. Contrary to the

¹⁰² *Glik v. Cuniff*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹⁰³ *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

¹⁰⁴ *Id.* at 608.

¹⁰⁵ Illinois Eavesdropping Law, 720 ILCS § 5/14-1(a) (1994).

¹⁰⁶ *Alvarez*, 679 F.3d at 590.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

majority's assertion, limiting the extent to which an individual may record speech does not raise the same vexing concerns that prohibiting a person from freely expressing their own thoughts would have.¹⁰⁹

Specifically, the majority analogized the right to record to many actions that qualify as free expression under the First Amendment.¹¹⁰ For example, an individual enjoys the right to take notes during governmental committee meetings.¹¹¹ However, this analogy fails to account for the fact that taking notes still requires independent thought, and disseminating the information requires independent expression. In contrast, recording a police officer's voice and distributing it simply regurgitates speech. Moreover, even if a person were to take notes verbatim, this transcript is still less egregious than the voice recording of a person because the recording damages credibility in a way that notes could not. With an audio recording a person cannot simply deny the allegations made against her, and her credibility is impeached in an irreversible way. The ACLU seeks to use audio recordings because they have a unique ability to, as Judge Posner indicated in his dissent, damage the credibility of an individual. Thus, this uniqueness must be acknowledged when evaluating its nature under the First Amendment.

The majority also analogized the right to record to the right to donate campaign funds.¹¹² However, the fatal flaw in this analogy is that donating campaign funds still involves willing free expression. Campaign donations provide individuals with the ability to use money as an instrument of expression to promote their own ideas. In contrast, an audio recording promotes ideas that often times the speaker does not want promoted. The act of recording a conversation at its most basic level involves gathering information, without any expression. Even if we adopt the majority's view that recording speech is only an integral step in the process of sharing that recording, recording speech

¹⁰⁹ *Id.* at 589-90.

¹¹⁰ *Id.* at 590.

¹¹¹ *Iacobucci v. Boulter*, 193 F.3d 14, 27 (1st Cir. 1999) (holding that the right to record a government committee meeting is a clearly established First Amendment right).

¹¹² *Id.*

is still the *forced* dissemination of expression rather than the free dissemination of it.¹¹³ While this audio recording may still enjoy First Amendment protection, it does so under the First Amendment right to gather information from an unwilling source.

All of the examples cited by the majority, the right to take notes, the right to paint, the right to donate campaign funds, necessarily involve free and willing expression.¹¹⁴ Contrarily, disseminating an audio recording against the speaker's wishes involves the forced dissemination of speech. In equating audio recording to free expression the majority failed to give this meaningful distinction its due weight. As such, the majority's delineation may negatively impact future First Amendment analysis.

B. Detrimental Policy Implications

The majority's mischaracterization of the right implicated by the IEL will likely impact future First Amendment analysis. By equating audio recording with the vast First Amendment right of free expression, the majority has given audio recording an unbridled scope of protection. While it is important to acknowledge that people have a right to acquire information about their government, and to hold police officers accountable for their actions, this right is limited, and must be weighed against other governmental interests.

As Judge Posner indicated in his dissent, it is important to weigh the state's interest in protecting the safety of its officers and citizens with the need to protect the privacy of its inhabitants.¹¹⁵ This Comment does not assert the state's interests were reasonably achieved by the IEL statute, but it does suggest that there are other governmental interests which should be weighed with a limited First Amendment right to gather information, rather than the expansive First Amendment right to speak freely.

¹¹³ *Id.* at 588.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 610 (Posner, J., dissenting).

In the *Branzburg* opinion, the Court acknowledged the very concerns that are implicated by the IEL.¹¹⁶ In *Branzburg*, the Court held that recognizing an overly broad right to gather information might negatively impact governmental functions.¹¹⁷ That is exactly the concern raised by the State in this case. As Judge Posner indicated, permitting audio recording, even in public places, may still chill speech because it makes a person weary to express their thoughts for fear of the distribution of her ideas.¹¹⁸ It also distracts police officers from their duties, and places both their lives and the lives of Illinois' citizens at risk.¹¹⁹ Because the nature of the right in question in *Alvarez* raises many of the same concerns that the Supreme Court considered in *Branzburg*, it is more suitable to evaluate audio recording under *Branzburg*'s categorization of First Amendment rights. By acknowledging that the right to audio record is a limited First Amendment right, the Seventh Circuit would be able to more accurately balance the state's compelling interest in protecting the privacy of its citizens with the safety of its law enforcement.

CONCLUSION

Though the Seventh Circuit correctly found that the IEL was likely unconstitutional under the First Amendment, the court mischaracterized the right implicated by audio recording. The Seventh Circuit should rule consistently with the First, Third, and Eleventh Circuits and find that the right to audio record is a limited First Amendment right to gather information, as stated by the Supreme Court in *Branzburg*. By acknowledging the limits of this right, the Seventh Circuit will be able to more accurately weigh the various governmental interests asserted by the State against the rights implicated by the IEL.

¹¹⁶ *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972).

¹¹⁷ *Id.*

¹¹⁸ *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting).

¹¹⁹ *Id.*